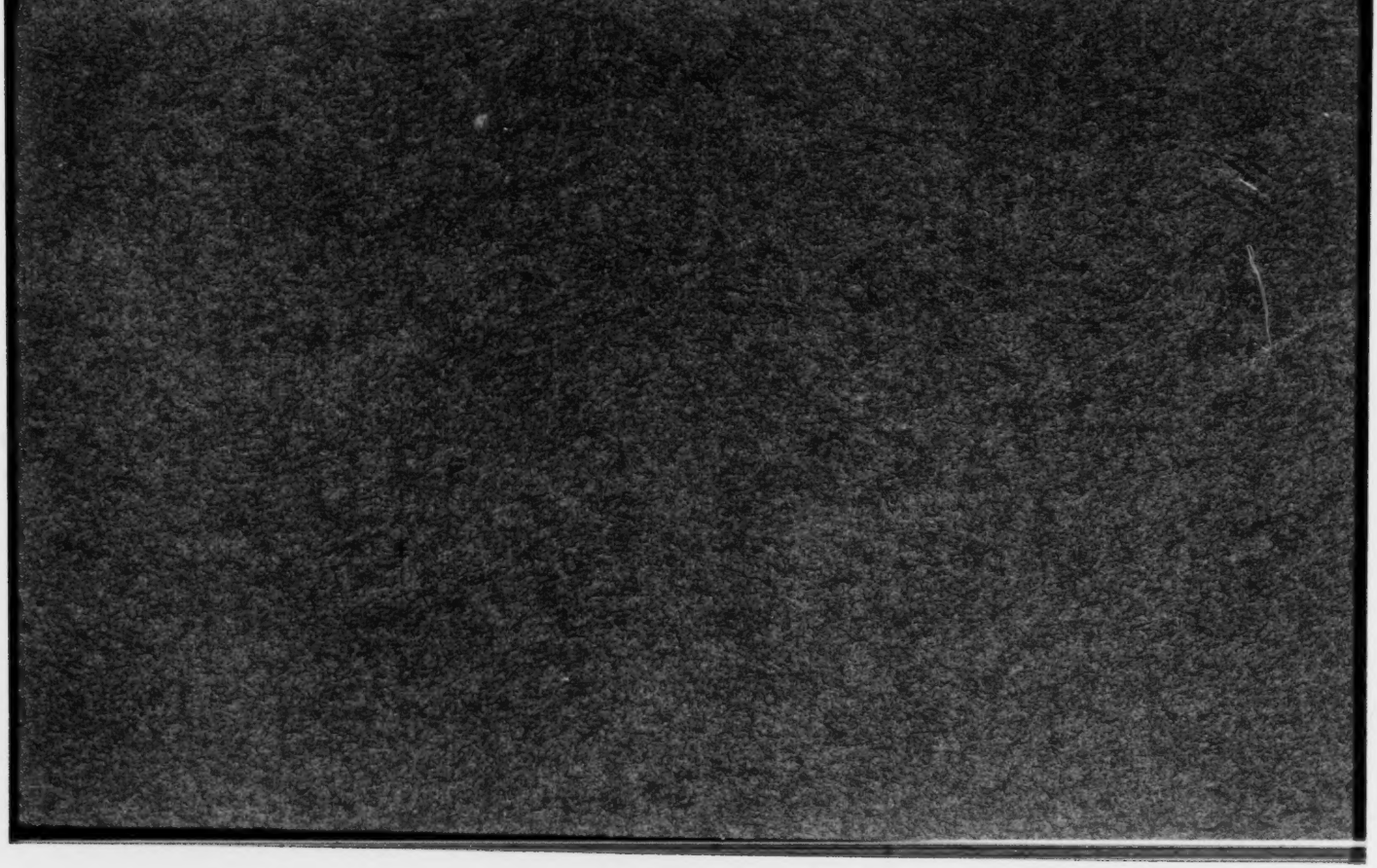

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question involved	2
Statute involved	2
Statement	4
Argument	10
Conclusion	16

CITATIONS

Cases:

Art Metal Const. Co. v. *United States*, 47 F. (2d) 558, certiorari denied, 283 U. S. 863 ..... 11, 12

Guantanamo Sugar Co. v. *United States*, decided April 7, 1941 11

Kales v. *United States*, 115 F. (2d) 497, certiorari granted, April 28, 1941, No. 826, this Term 12, 13, 14

Ritter v. *United States*, 28 F. (2d) 265 15

Snead v. *Elmore*, 59 F. (2d) 312 12

United States v. *Andrews*, 302 U. S. 517 11

United States v. *Garbutt Oil Co.*, 302 U. S. 528 15

Statutes:

Revenue Act of 1926, c. 27, 44 Stat. 9:

Sec. 284 2

Sec. 1113 3

Miscellaneous:

T. D. 4266, VIII–1 Cum. Bull. 111, promulgated March 27, 1929 14

314864—41——1

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 920

WRIGHTSMAN PETROLEUM COMPANY, A CORPORATION, FOR ITSELF AND C. J. WRIGHTSMAN, ITS SOLE STOCKHOLDER AND BENEFICIARY IN DISSOLUTION, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court below (R. 34–38) is reported in 35 F. Supp. 86.

JURISDICTION

The judgment of the court below was entered on October 7, 1940 (R. 38). A motion for a new trial was filed on November 20, 1940, and overruled on January 6, 1941 (R. 38). The petition for writ of certiorari was filed April 4, 1941 (R. 38). The jurisdiction of this Court is invoked

under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTION INVOLVED

Whether the claim for refund upon which this suit is based, which was filed after the statutory period for filing claims, is a permissible amendment of certain timely claims.

STATUTE INVOLVED

Revenue Act of 1926, c. 27, 44 Stat. 9:

> SEC. 284. (a) Where there has been an overpayment of any income, war-profits, or excess-profits tax imposed by this Act, the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, the Revenue Act of 1921, or the Revenue Act of 1924, or any such Act as amended, the amount of such overpayment shall, except as provided in subdivision (d), be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer.
>
> (b) Except as provided in subdivisions (c), (d), (e), and (g) of this section—

(1) No such credit or refund shall be allowed or made after three years from the time the tax was paid in the case of a tax imposed by this Act, nor after four years from the time the tax was paid in the case of a tax imposed by any prior Act, unless before the expiration of such period a claim therefor is filed by the taxpayer; and

(2) The amount of the credit or refund shall not exceed the portion of the tax paid during the three or four years, respectively, immediately preceding the filing of the claim, or if no claim was filed, then during the three or four years, respectively, immediately preceding the allowance of the credit or refund.

* * * * *

SEC. 1113. (a) Section 3226 of the Revised Statutes, as amended, is reenacted without change, as follows:

"SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding

may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

* * * * *

STATEMENT

The special findings of fact of the Court of Claims (R. 18–33) may be summarized as follows:

Petitioner, the Wrightsman Petroleum Company, formerly the Hawk Oil Company, was organized as a corporation under the laws of Delaware in 1921. All of its stock, except qualifying shares, has at all times been beneficially owned by C. J. Wrightsman, petitioner, sole beneficiary in liquidation. The corporation was dissolved on July 24, 1933, but was continued for a period of three years subsequent thereto for the purpose of instituting suit (R. 18–19).

The Osage Oil Corporation and the Osage Trading Company were corporations, the entire capital

stock of which was at all times during the calendar year 1927 owned by the petitioner. The Wrightsman Oil Corporation, the entire outstanding capital stock of which was at all times during its existence owned by the petitioner, was dissolved on July 26, 1927 (R. 19).

On March 15, 1928, petitioner, as the parent corporation, filed a consolidated return of income for the year 1927 on behalf of itself and the other corporations above mentioned. Subsequently, all of the corporations filed a formal agreement to the effect that the entire tax liability for the taxable year 1927 should be assessed against and paid by petitioner. The consolidated return showed a total tax due of $27,490.49 which was paid in quarterly installments during the year 1928 (R. 28).

On May 27, 1929, petitioner filed an amended consolidated return for the calendar year 1927, showing a tax liability of $12,199.81 and a refund due of $15,290.68. In both the original return and the amended return there were included certain amounts designated as "oil earnings" received by petitioner and by the Osage Oil Corporation under certain contracts by which the petitioner and the Osage Oil Corporation respectively received a certain proportion of the earnings as consideration for the sale of their respective interests in oil and gas leases. No deduction was taken in either the original or amended re-

turn for depletion with respect to the above-mentioned "oil earnings" (R. 28–29).

On May 27, 1929, petitioner also filed a claim for refund in the amount of $15,290.68 for the calendar year 1927, stating therein as follows (R. 29–30):

> Under date of August 17, 1928, a deficiency for taxable year 1926, in the sum of $17,170.87 was asserted against the Osage Oil Corporation, subsidiary of the Wrightsman Petroleum Company, which proposed assessment is now pending on application of the taxpayer for review before the Treasury Department.
>
> Additional tax of $1,713.53 was agreed to by the taxpayer and payment made in that amount on November 15, 1928.
>
> The prosecution of this claim for refund is contingent upon the final determination by the Bureau, or other proper tribunal, that the Osage Oil Corporation is liable for such adiditonal tax for said year 1926.

After an examination made by a Revenue Agent, a report was rendered to the Commissioner of Internal Revenue on the operations of the entire affiliated group for the year 1927, showing a proposed overassessment of $8,953.26, resulting principally from adjustments due to correction of 1925 loss, correct profit and loss on sale of assets, depreciation adjustments, disallowance of bad debts, and personal expenses of stockholders. It was stated in the report that the taxpay-

er's representative did not agree to the adjustments and that one of the bases of the objection was that the taxpayer considered that it was entitled to 27½% depletion on payments received out of oil produced. In an engineer's report attached to this Revenue Agent's report, the amounts received from oil and gas sales were set forth as "Oil and gas payments not subject to depletion". Another exhibit attached to this report showed the deficit of Wrightsman Oil Company as of date of dissolution to be $162,473.34 (R. 30–31).

Another report under date of March 10, 1930, was made by the Revenue Agent and a copy furnished petitioner showing a proposed deficiency for the year 1927, of $463.77. This report contained the following statement (R. 31):

> Principal changes are due to elimination of prior year loss brought forward in accordance with decision Sweets Company of America, 12 B. T. A., P. 1285.
>
> All changes were fully explained to H. Lea, Secy., who does not agree to the adjustments.
>
> Basis for taxpayer's objections: Taxpayer objects to the changes in this report on the grounds that 1926 taxes have not been passed upon by the Board of Tax Appeals, where the case is now pending and claims allowance of 27½% depletion on oil and gas sales from properties where taxpayer claims oil and gas rights were retained thru previous

> sales. Owing to illness Mr. Lea is unable to prepare a formal protest for submission at this date but will submit same within the near future.

On January 27, 1931, the Deputy Commissioner of Internal Revenue advised petitioner of a proposed overassessment in the amount of $4,602.66. This overassessment was based upon the allowance of deduction for 1925 net losses and did not reflect any deduction on account of either (1) depletion with respect to the payments received by the petitioner under the above-mentioned agreements, or (2) loss on liquidation of Wrightsman Oil Company (R. 31–32).

On February 7, 1931, petitioner filed a supplemental claim for refund for the calendar year 1927, in the amount of $4,602.66, stating the grounds thereof as follows (R. 32):

> See letter from J. C. Wilmer, Deputy Commissioner, dated January 27, 1931 (IT:AR:E–6–LBV) copy attached hereto.
>
> The proposed refund of the Treasury Department of the United States Government in the above sum is hereby accepted by Wrightsman Petroleum Company with the specific understanding that such payment shall in no wise prejudice or conclude the rights of the said Wrightsman Petroleum Company and the Osage Oil Corporation, or either of them, to assert, demand and/or maintain its or their, or either of their, claims for refund or credit growing out of

> the assessment for income taxes for the years 1926 and 1927, or either of said years, against Wrightsman Petroleum Company or Osage Oil Corporation, or either of them, for said years 1926 and 1927, or either of said years.

On November 27, 1934, the Deputy Commissioner of Internal Revenue advised petitioner that a redetermination of its tax liability showed an overassessment in the amount of $1,040.06. This redetermination did not reflect any deduction for depletion with respect to the amounts received under the above-mentioned contracts or loss on liquidation of the Wrightsman Oil Company (R. 32).

On March 4, 1935, petitioner filed what it called an amended claim for refund of $15,650.68 for the year 1927, upon the specific grounds as follows, together with detailed facts in support of the claims (R. 33):

> (1) Additional depletion in the amount of $67,830.69 with respect to the aforesaid items of gross income from retained interests in oil and gas leases, and
>
> (2) A loss on the liquidation of the Wrightsman Oil Company in the amount of $40,396.17.

On August 28, 1935, petitioner was advised that its claim filed on March 4, 1935, would be disallowed on the ground that it was barred by the statute of limitations and notice of rejection was mailed on September 28, 1935 (R. 33).

Thereafter the Commissioner of Internal Revenue issued a certficate of overassessment to peti-

tioner for the year 1927, in the amount of $1,040.06, together with interest, and this amount was refunded to petitioner. On November 7, 1935, the Commissioner notified petitioner by registered mail that its claims for refund were rejected to the extent not previously allowed (R. 33).

This suit was filed in the Court of Claims on July 22, 1936, seeking refund on the grounds set forth in the claim of March 4, 1935 (R. 1, 16–17).

Upon the foregoing facts, the Court of Claims held that the suit could not be maintained and dismissed the petition (R. 38).

ARGUMENT

1. This suit is based upon a claim for refund filed on March 4, 1935, seeking a refund of taxes paid during the year 1928. The claim was not filed within the statutory period of limitations as prescribed by Section 284 of the Revenue Act of 1926, requiring that a claim be filed within three years from the payment of the tax. Petitioner, however, seeks to avoid the bar of the statute of limitations by contending that this claim was an amendment of one or the other of two earlier timely claims. The first timely claim upon which petitioner relies was filed on May 27, 1929, based upon the ground that there was a deficiency assessment then pending against the Osage Oil Corporation, one of petitioner's subsidiaries, and stating that the prosecution of the claim was con-

tingent upon the final determination of the Osage Oil Corporation's tax liability for 1926. Since this claim stated that its prosecution was contingent upon a certain happening, it is doubtful whether it really constituted a valid claim for refund. Cf. *Art Metal Const. Co.* v. *United States,* 47 F. (2d) 558 (C. C. A. 2d), certiorari denied, 283 U. S. 863. If, however, it may be regarded as a valid claim, it was either (1) a specific claim, as the Court of Claims held, or (2) it became a specific claim through amendment by a claim filed February 7, 1931, which for reasons hereinafter stated was a specific claim. In either event it was not subject to amendment after the statutory period for filing claims by another claim based on different grounds. *United States* v. *Andrews,* 302 U. S. 517; *Guantanamo Sugar Co.* v. *United States,* decided by the Court of Claims on April 7, 1941, not yet officially reported but found in 1941 Prentice-Hall, Vol. 4, par. 62,590.

The claim for refund filed on February 7, 1931, was filed as the result of a letter of January 27, 1931, to petitioner advising it that the Commissioner had determined an overassessment in its income tax liability for that year. The claim was for the amount of the proposed overassessment and it was stated that it was based upon the letter of January 27, 1931. In this claim it was further stated that the proposed refund of the overassessment was accepted with the understanding that

such payment should in nowise prejudice the rights of petitioner or of the Osage Oil Corporation to (R. 32)—

> assert, demand and/or maintain * * * claims for refund or credit growing out of the assessment for income taxes for the years 1926 and 1927. * * *

Clearly this claim was a specific one for the refund of the amount of the overassessment and was based upon the same grounds as that of the overassessment, none of which involved any of the items in this suit.

Moreover, the reservation of the right to assert, demand or maintain claims does not in any event meet the requirements of a claim for refund. It is at the most merely an attempt to reserve the right to prosecute claims already filed or file further claims. It has been expressly held that such a general reservation of rights does not amount to a claim for refund. *Art Metal Const. Co.* v. *United States, supra; Snead* v. *Elmore,* 59 F. (2d) 312 (C. C. A. 5th).

2. The decision of the court below is not in conflict with that of the Circuit Court of Appeals for the Sixth Circuit in *Kales* v. *United States,* 115 F. (2d) 497, certiorari granted, April 28, 1941, No. 826, this Term. In the *Kales* case, a letter, protesting against a proposed additional assessment resulting from the Commissioner's determination that the value of certain stock was less

than that previously determined, was written by the taxpayer in which she contended that the valuation originally determined by the Commissioner could not be reopened, the last two paragraphs of the letter stating that if it were held that such determination could be reopened then the taxpayer would claim an even higher valuation than that used in her returns. The amount of the additional assessment was paid and suit brought for its recovery, it being finally held that the original determination could not be changed and the amount of the additional assessment was refunded. Thereafter, and after the statutory period for filing claims, the taxpayer filed what purported to be an "amended claim for refund" upon the ground that the value of the stock was even higher than the amount of the Commissioner's first determination. The Circuit Court of Appeals for the Sixth Circuit held that the letter of protest was an informal claim for refund, that in it the taxpayer notified the Commissioner that she intended to press her claim for a higher valuation and that it put the Commissioner on notice of the grounds relied upon in the so-called amended claim. It is our position in our petition for certiorari in the *Kales* case that the court erred in failing to hold that even if the letter be considered as a claim for refund it had become extinguished by the earlier judgment and that in any event the letter did not constitute a claim for refund.

Nevertheless, the decision, even if correct, is not in conflict with the decision in the instant case. In the first place, the claims which are relied upon as subject to amendment in this case are formal and specific ones and the reservation made by petitioner in the claim of January 27, 1931, could not convert them into a general claim. In the second place, except for oral statements made to the Revenue Agent, the grounds upon which this suit is based were never called to the Commissioner's attention prior to the filing of the claim now relied on. In the *Kales* case, the Circuit Court laid stress on the fact that the grounds ultimately set forth in the late claim were called to the Commissioner's attention in the letter of protest. The court in the *Kales* case also refers to T. D. 4266, VIII–1 Cum. Bull. 111, promulgated March 27, 1929, which authorizes the Commissioner to make a refund after the expiration of the statutory period of limitations in any case in which an informal or defective claim filed prior to the expiration of the period of limitations and stating specifically the ground for refund is perfected by the filing of a claim prior to May 1, 1929. That decision also provides that only the grounds set forth in such formal claim, which were also set forth in such informal or defective claim, will be considered. In the instant case, the claim relied upon by petitioner as subject to amendment, and also the so-called amended claim, were both filed after May 1, 1929.

The grounds set forth in the formal claim here in question were never set forth in any informal or defective claim. The oral statements to the Revenue Agent cannot be considered as constituting even an informal claim. *Ritter* v. *United States,* 28 F. (2d) 265 (C. C. A. 3d).

3. Since the claims for refund filed on May 27, 1929, and February 7, 1931, were both specific claims and not subject to amendment, the petitioner's contention (Pet. 6)—

> that the Commissioner of Internal Revenue was fully and timely apprised through examinations of petitioner's affairs, or otherwise, of deductions ultimately claimed in an amended claim for refund filed on March 4, 1935, and that the said amendment was, therefore, permissible

is clearly without merit. In *United States* v. *Garbutt Oil Co.,* 302 U. S. 528, this Court held that the Commissioner could not extend the statutory period for filing claims and that the fact that he may have considered the grounds advanced in an untimely claim was of no avail to the taxpayer. Moreover, there is no indication whatsoever in the instant case that the Commissioner ever considered the grounds raised in the 1935 claim. The only evidence that he was even apprised of such grounds is that in the Revenue Agent's report it was stated that the petitioner was protesting the amount of the proposed overassessment on one of these grounds. The Revenue Agent further stated

in his report that a formal protest would be submitted. This was in 1931, and the petitioner did not thereafter make any protest in this respect and made no further reference to the issues here involved until the claim for refund was filed on March 4, 1935. The Commissioner may well have considered that the petitioner had abandoned these grounds. This is clearly not a case where the Commissioner has misled the petitioner in any way but is simply one where the petitioner has apparently slept on its right.

CONCLUSION

The decision of the court below is clearly in accord with the decisions of this Court in the *Andrews* and *Garbutt Oil Co.* cases, *supra,* and is correct. No conflict of decision has been shown. The petition should be denied.

Respectfully submitted.

FRANCIS BIDDLE,
Solicitor General.
SAMUEL O. CLARK, JR.,
Assistant Attorney General.
SEWALL KEY,
ELIZABETH B. DAVIS,
Special Assistants to the Attorney General.

MAY 1941.

U. S. GOVERNMENT PRINTING OFFICE: 1941